85-1548

No. .....

Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

CLIVE DILLON,

Petitioner,

v.

RAYMOND LUTTERMAN, in his official capacity and as an individual and the CITY OF POWELL, a municipal corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BERNARD Q. PHELAN
Attorney at Law
2020 Carey Avenue, Suite 402
P.O. Box 1841
Cheyenne, Wyoming 82003-1841
Counsel for Petitioner
(307) 634-8085

DATE: March, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

30PP

QUESTIONS PRESENTED

1. Does the entry of a Rule 54(b) certification which deems a prior memorandum decision granting summary judgment a "final judgment" meet the required "separate-document" rule of Rule 58?

2. Is a belated entry of a Rule 54(b) certification subsequent to the filing of a notice of appeal sufficient to invoke appellate jurisdiction in the absence of prejudice?

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutes and Rules Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Argument I

A Rule 54(b) Certification Does Not Meet The Rule 58 Separate-Document Requirement. 6

Argument II

Entry of a Rule 54(b) Certification Subsequent to the Filing of a Notice of Appeal is Sufficient to Invoke Appellate Jurisdiction. 9

Summary 12

Conclusion 12

Appendices:

Appendix A—Order and Judgment of the United States Court of Appeals for the Tenth Circuit .....App. 1

Appendix B—Order Denying Motion for Order Directing Entry of Summary Judgment in the United States District Court for the District of Wyoming .....App. 5

Appendix C—Order and Judgment of the United States Court of Appeals for the Tenth Circuit .....App. 7

TABLE OF CONTENTS—Continued

Pages

Appendix D—Order Determining that Order Granting Summary Judgment is Final Judgment in the United States District Court for the District of Wyoming .....App. 11

TABLE OF AUTHORITIES

CASES:

Pages

A. O. Smith Corp. v. Sims Consolidated, Ltd., 647 F.2d 118 (10th Cir. 1981) 4, 5, 9, 11

Bankers Trust Co. v. Mallis, 435 U.S. 381, 55 L.Ed. 2d 357, 98 S.Ct. 1117 (1978) 5, 6, 7, 8, 9

Cape May Green, Inc. v. Warren, 698 F.2d 179, 185 (3rd Cir. 1983) 11

Carnes v. United States, 279 F.2d 378 (10th Cir. 1960) 8

Dawson v. Chrysler, 630 F.2d 950 (3d Cir. 1980), 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981) 10

Freeman v. Hittle, 747 F.2d 1299 (9th Cir. 1984) 10, 11

Gillespie v. U. S. Steel Corp., 379 U.S. 148, 152, 85 S.Ct. 308, 3 L.Ed.2d 199 (1949) 11

Gumer v. Shearson Hammill and Co., 516 F.2d 283 (2d Cir. 1974) 10

Kirtland v. J. Ray McDermott and Co., 568 F.2d 1166 (5th Cir. 1978) 11

Lac Courte Oreilles Band v. State of Wisconsin, 760 F.2d 177 (7th Cir. 1985) 5, 10, 11

Marrese v. American Academy of Orthopaedic Surgeons, — U.S. —, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985) 10

Mullins v. Nickel Plate Mining Co., 691 F.2d 971 (11th Cir. 1982) 11

Richardson v. Jones, 551 F.2d 918 (3rd Cir. 1977) 10

Tilden Financial Corp. v. Palo Tire Supply, 596 F.2d 604 (3rd Cir. 1979) 10, 11

United States v. Clearfield State Bank, 497 F.2d 356 (10th Cir. 1974) 5

TABLE OF AUTHORITIES—Continued

	Pages
United States v. Evans, 365 F.2d 95 (10th Cir. 1966)	8
United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 2 L.Ed.2d 721, 78 S.Ct. 674, 73 A.L.R2d 235 (1958)	6
United States v. Indrelunas, 411 U.S. 216, 36 L.Ed. 2d 202, 93 S.Ct. 1562 (1973)	5, 6, 7, 8
United States v. Kansas City, 761 F.2d 605 (10th Cir. 1985)	5
STATUTES AND RULES:	
28 U.S.C. 1254(1)	2
28 U.S.C. 1291	2
28 U.S.C. 1331	4
28 U.S.C. 1343	4
42 U.S.C. Section 1983	4
Rule 4(a) (2) F.R.A.P.	3, 5, 9, 10, 11
Rule 54(b) Fed.R.Civ.P.	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12
Rule 58 Fed.R.Civ.P.	2, 3, 4, 5, 6, 9, 10, 12
TREATISES:	
9 *Moore's Federal Practice*, 2d Ed. § 204.14, p. 4-116-4-118	11
11 *Wright and Miller, Federal Practice and Procedure*, Section 2782, p. 10-11; Section 2785, p. 14	7

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

CLIVE DILLON,

Petitioner,

v.

RAYMOND LUTTERMAN, in his official capacity and as an individual and the CITY OF POWELL, a municipal corporation,

Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which appears in Appendix A, p. App. 1, *infra,* is not reported.

The Order Denying Motion for Order Directing Entry of Summary Judgment is not officially reported and appears in Appendix B, p. App. 5, *infra.*

JURISDICTION

Clive Dillon, petitioner, seeks a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit for review of an Order and Judgment affirming the lower court's order denying appellant's motion requesting that the lower court's decision granting summary judgment be on a separate document. The Tenth Circuit's Order and Judgment was entered on January 30, 1986. Appendix A, p. App. 1, *infra*.

This Petition for a Writ of Certiorari is sought pursuant to 28 U.S.C. 1254(1).

———o———

STATUTES AND RULES INVOLVED

This matter involves the appealability of final judgments. Therefore, 28 U.S.C. 1291 is involved, and provides in pertinent part, as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

This matter also involves the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The specific rules involved are Rule 54(b), Rule 58 Fed.R. Civ.P. and Rule 4(a)(2) F.R.A.P. Those rules, in pertinent part are as follows:

Rule 54(b) Federal Rules of Civil Procedure:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties

> are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

* * * *

Rule 58 Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> "Every judgment shall be set forth on a separate document."

Rule 4(a)(2) Federal Rules of Appellate Procedure provides, in pertinent part, as follows:

> "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

STATEMENT OF THE CASE

This case presents to the court, in a factually forthright manner, questions as to whether or not a Rule 54(b) Fed.R.Civ.P. certification constitutes a final judgment pursuant to the Rule 58 separate-document rule; and as to whether a Rule 54(b) certification entered subsequent to a notice of appeal is sufficient to invoke appellate jurisdiction. Neither question has been addressed by this court and in view of direct conflicts among the circuits, this court should grant this petition to resolve these important questions.

Petitioner initially commenced a 42 U.S.C. Section 1983 action against the defendants asserting 28 U.S.C. 1331 and 1343 as the jurisdictional basis of the action. Defendant City of Powell filed a counterclaim. On August 29, 1984, the District Court for the District of Wyoming granted defendants' motion for summary judgment. Petitioner filed a Notice of Appeal. Subsequently, Petitioner filed a motion seeking a determination that the summary judgment was a final order pursuant to Fed.R.Civ.P. 54(b). The district court granted the motion on September 27, 1984. Thereafter, City of Powell filed a motion to dismiss its counterclaim without prejudice. The district court granted the motion.

Upon appeal, the Tenth Circuit held that it did not have jurisdiction to consider the appeal because petitioner's notice of appeal was *prematurely* filed before Rule 54(b) certification citing *A. O. Smith Corp. v. Sims Consolidated, Ltd.*, 647 F.2d 118 (10th Cir. 1981). Consequently, the court of appeals did not address petitioner's argument that the order granting summary judgment violated the separate-document rule, Fed.R.Civ.P. 58.

After receiving the order and judgment of the court of appeals, petitioner filed a motion in the district court for an order directing entry of summary judgment pursuant to Rule 58 Fed.R.Civ.P. The district court denied the motion, finding that the August 29, 1984, order granting summary judgment expressly stated the action was dismissed as to both defendants' and the September 27, 1984, order providing Rule 54(b) certification expressly stated the August 29, 1984, motion was a final judgment pursuant to Rule 54(b). Petitioner again appealed to the Tenth Circuit Court of Appeals.

Upon appellees' motion to affirm, the Tenth Circuit Court of Appeals summarily affirmed the motion holding that the Rule 54(b) certification order of September 27, 1984, " . . . met the Rule 58 separate-document requirement and established with certainty . . . that a final judgment had been entered." See Appendix A, p. App. 3, *infra*. The court cited *Bankers Trust Co. v. Mallis*, 435 U.S. 381, *reh'g denied*, 436 U.S. 915 (1978), *United States v. Indrelunas*, 411 U.S. 216 (1973), *United States v. Kansas City*, 761 F.2d 605 (10th Cir. 1985), and *United States v. Clearfield State Bank*, 497 F.2d 356 (10th Cir. 1974) in support of its decision.

REASONS FOR GRANTING THE WRIT

The Petitioner argues the following reasons why this Petition for Writ of Certiorari should be granted.

1. The federal court of appeals has so far departed from the accepted and usual course of judicial proceedings so as to make the mechanically applied "separate-document" rule (Rule 58 Fed.R.Civ.P.) a nullity. *United States v. Indrelunas*, 411 U.S. 216, 36 L.Ed.2d 202, 93 S.Ct. 1562 (1973); *Bankers Trust Co. v. Mallis*, 435 U.S. 381, — L.Ed.2d —, 98 S.Ct. 1117 (1978).

2. The decision of the Federal Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to make the premature notice of appeal rule, (Rule 4(a) (2) F.R.A.P.), a nullity and is in direct conflict with a number of other federal courts of appeal. Compare *A. O. Smith Corp. v. Sims Consolidated, Ltd.*, 647 F.2d 118 (10th Cir. 1981) with *Lac Courte Oreilles Bank v. State of Wisconsin*, 760 F.2d 177 (7th Cir. 1985).

ARGUMENT I

A RULE 54(b) CERTIFICATION DOES NOT MEET THE RULE 58 SEPARATE-DOCUMENT REQUIREMENT.

In *United States v. Indrelunas,* 411 U.S. 216, 36 L.Ed. 2d 202, 93 S.Ct. 1562 (1973), this court stated the following concerning the "separate-document" rule found in Rule 58 Fed.R.Civ.P.:

> The reason for the "separate-document" provision is clear from the notes of the advisory committee of the 1963 amendment. * * * * Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. See, e.g., *United States v. F & M Schaefer Brewing Co.,* 356 U.S. 227, 2 L.Ed.2d 721, 78 S.Ct. 674, 73 ALR2d 235 (1958). To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.

Indrelunas, supra, p. 220.

In *Bankers Trust Co. v. Mallis,* 435 U.S. 384, 55 L.Ed. 2d 357, 98 S.Ct. 1117 (1978), however, this court held that even though a "separate-document" setting forth the judgment of the trial court was not in the record, the implied waiver of the parties, evidenced by presenting the case to the appellate court as if there was judgment pursuant to Rule 58, would allow an appellate court to assert jurisdiction. *Bankers Trust Co., supra,* pp. 387-388.

In the instant case, no such "waiver" is evident. Indeed, even after the Tenth Circuit Court of Appeals refused to consider the separate-document rule as one of petitioner's arguments in the initial proceeding as to whether the Notice of Appeal was untimely, petitioner formally requested that the district court enter a judgment on a "separate document" which was denied on the grounds that the memorandum opinion of August 29, 1984, expressly stated that the action was dismissed against defendants *and* that the Rule 54(b) certification of September 27, 1984, stated that the August order was "a final order."

In 11 Wright and Miller, *Federal Practice and Procedure*, Section 2782, pp. 10-11, it is explained that prior to the amendment of the Federal Rules in 1963, there was particular difficulty under the rules in that there was uncertainty as to whether or not a judgment was entered when there was an opinion or memorandum containing some "apparently directive or dispositive words."

Therefore, as pointed out in *Indrelunas, supra*, and *Bankers Trust Co., supra*, Rule 58 was amended to " . . . eliminate [these] uncertainties by requiring that there be a judgment set out on a separate document . . . ." *Bankers Trust Co., supra*, p. 385. As pointed out in 11 Wright and Miller, *Federal Practice and Procedure*, Section 2785, p. 14 "[I]t is *no longer possible*, as it was prior to 1963, for an opinion to have the effect of a judgment. Instead, there must be a separate document on which the judgment is set forth." (Emphasis Supplied).

The separate document requirement was thus intended to avoid the inequities that were inherent when a

party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely. *Bankers Trust Co., supra,* p. 385.

In the case at bar a judgment on a separate document *has never been entered* despite this court's admonition that the separate-document rule must be "mechanically applied" in determining whether an appeal is timely. *Indrelunas, supra,* pp. 221-222. Instead, there is a memorandum opinion with dispositive language and a Rule 54(b) certification that determines that the memorandum opinion is a "final judgment." See Appendix D, p. App. 11, *infra.*

There are no cases found in which a Rule 54(b) certification has been deemed a final judgment which conforms to the separate document rule, save and except the case at bar. *United States v. Evans,* 365 F.2d 95 (10th Cir. 1966), which is relied on by the appellate court, although being subsequent to the separate document amendment, cites *Carnes v. United States,* 279 F.2d 378 (10th Cir. 1960) for the proposition that the determination as to whether a judicial act is a final judgment depends upon the " . . . intention of the judge." *Evans, supra,* p. 97. Although this may be true, it does not support the theory that a Rule 54(b) certification constitutes a "final judgment" when it purports to point to a prior memorandum opinion as a "final judgment." See Appendix D, p. App. 11, *infra.*

To say that a memorandum opinion can be converted to a final judgment by merely declaring it to be causes violence to the clear, unequivocal and unambiguous lan-

guage of the Rule 58 separate document rule: "Every judgment shall be set forth on a separate document." If such is the case, the policy of this court that the Federal Rules of Civil Procedure are to be "construed to secure the just, speedy and inexpensive determination of every action," *Bankers Trust Co., supra,* p. 387, is nothing more than an empty proposition.

———o———

ARGUMENT II

ENTRY OF A RULE 54(b) CERTIFICATION SUBSEQUENT TO THE FILING OF A NOTICE OF APPEAL IS SUFFICIENT TO INVOKE APPELLATE JURISDICTION.

The appellate court relied upon *A. O. Smith Corp. v. Sims Consolidated, Ltd.,* 647 F.2d 118 (10th Cir. 1981), in dismissing the initial appeal of this matter. In *A. O. Smith Corp., supra,* the court held that in a situation where a notice of appeal preceded a Rule 54(b) certification a *second* notice of appeal had to be filed *after* the certification to perfect the appeal. In applying the *A. O. Smith* case to appellant, the court held that it was necessary for the appellant to file a second notice of appeal after the September 27, 1984, Rule 54(b) certification. Because there was no second notice of appeal, the case was dismissed. See Appendix C, p. App. 10, *infra.*

Such a requirement flies in the face of Rule 4(a)(2) of the Federal Rules of Appellate Procedure which provides:

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

Assuming, for the sake of argument, that the September 27, 1984, Rule 54(b) certification constituted a judgment pursuant to Rule 58 (separate document rule, discussed above), it is incongruous that Rule 4(a)(2) *would not* apply.

Indeed, at least five circuits have adopted a practical approach to belated certification and have held that a belated certification pursuant to Rule 54(b) subsequent to a notice of appeal is sufficient to invoke appellate jurisdiction in the absence of prejudice to any party litigant. See e.g. *Lac Courte Oreilles Band v. State of Wis,* 760 F.2d 177 (7th Cir. 1985); *Freeman v. Hittle,* 747 F.2d 1299 (9th Cir. 1984); *Dawson v. Chrysler,* 630 F.2d 950 (3d Cir. 1980) cert. denied, 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981); *Gumer v. Shearson Hammill and Co.,* 516 F.2d 283 (2d Cir. 1974). See also *Marrese v. American Academy of Orthopaedic Surgeons,* — U.S. —, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985).

In *Tilden Financial Corp. v. Palo Tire Supply,* 596 F.2d 604 (3rd Cir. 1979), a certification was entered after the notice of appeal. The court held that under a prior decision, (*Richardson v. Jones,* 551 F.2d 918 (3rd Cir. 1977)), which held that a premature notice followed by a final order was jurisdictionally sufficient, a premature notice of appeal filed prior to a Rule 54(b) certification was sufficient as being analogous to a final order. *Tilden,*

supra, p. 607. See also, 9 *Moore's Federal Practice,* 2d Ed., § 204.14, pp. 4-116-4-118.

Tilden, supra, pre-dated Rule 4(a)(2) of the Federal Rules of Appellate Procedure, but it has been followed by a number of circuit court decisions. See e.g. *Cape May Green, Inc. v. Warren,* 698 F.2d 179 (3rd Cir. 1983); *Freeman v. Hittle,* 747 F.2d 1299 (9th Cir. 1984); *Lac Courte Oreilles Band v. State of Wisconsin,* 760 F.2d 177 (7th Cir. 1985).

Some courts, nevertheless, have followed the reasoning of *A. O. Smith Corp., supra,* and have required the formality of filing a notice of appeal *after* a Rule 54(b) certification despite the clear language of Rule 4(a)(2), F.R.A.P. See e.g. *Mullins v. Nickel Plate Mining Co.,* 691 F.2d 971 (11th Cir. 1982); *Kirtland v. J. Ray McDermott & Co.,* 568 F.2d 1166 (5th Cir. 1978). To require such a formality is to give little notice to the principle that "[P]ractical, not technical considerations are to govern the application of principles of finality." *Cape May Green, Inc. v. Warren,* 698 F.2d 179, 185 (3rd Cir. 1983), citing *Gillespie v. U. S. Steel Corp.,* 379 U.S. 148, 152, 85 S.Ct. 308, 3 L.Ed.2d 199 (1949).

———o———

SUMMARY

There has been no showing of any prejudice by appellees as a result of appellant's filing of a notice of appeal prior to the September 27, 1984, Rule 54(b) certification. There are no policy considerations against "piecemeal appeals" evident in this matter. The rules are clear and unambiguous regarding "premature" notice of appeal and a Rule 54(b) certification cannot be a "final judgment" pursuant to Rule 58. To resolve a conflict among the circuits which is of utmost importance in the litigation of cases, this court should grant this Petition for a Writ of Certiorari.

———o———

CONCLUSION

The court should grant this Petition for a Writ of Certiorari to resolve important conflicts among the circuits regarding premature notice of appeal, Rule 54(b) Certification and the Rule 58 separate document rule.

Respectfully submitted,

BERNARD Q. PHELAN
Attorney at Law
2020 Carey Avenue, Suite 402
P.O. Box 1841
Cheyenne, Wyoming 82003-1841
Counsel for Petitioner
(307) 634-8085

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 85-2261
(D.C. No. C84-0191)
(D. Wyo.)

CLIVE DILLON,

Plaintiff-Appellant,

v.

RAYMOND LUTTERMAN, in his official capacity and as an individual and CITY OF POWELL, a municipal corporation,

Defendants-Appellees.

ORDER AND JUDGMENT

(Filed January 30, 1986)

Before LOGAN, MOORE, and ANDERSON, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This matter is before the court on defendants' motion to affirm and plaintiff's response.

Plaintiff initially commenced a 42 U.S.C. § 1983 action against defendants. Defendant City of Powell filed a counterclaim. On August 29, 1984, the district court granted defendants' motion for summary judgment. Plain-

tiff filed a notice of appeal. Subsequently, plaintiff filed a motion seeking a determination that the summary judgment was a final order pursuant to Fed. R. Civ. P. 54(b). The district court granted the motion on September 27, 1984. Thereafter, City of Powell filed a motion to dismiss its counterclaim without prejudice. The district court granted the motion.

Upon appeal, this court held that it did not have jurisdiction to consider the appeal, because plaintiff's notice of appeal was prematurely filed before Rule 54(b) certification. Consequently, this court did not address plaintiff's argument that the order granting summary judgment violated the separate document rule, Fed. R. Civ. P. 58. Dillon v. Lutterman, Unpublished No. 85-2309 (10th Cir. filed June 12, 1985).

After receiving this court's order and judgment, plaintiff filed a motion in the district court for an order directing entry of summary judgment pursuant to Rule 58. The district court denied the motion finding that the August 29, 1984, order granting summary judgment expressly stated the action was dismissed as to both defendants and the September 27, 1984, order providing Rule 54(b) certification expressly stated the August 29, 1984, motion was a final judgment pursuant to Rule 54(b). Plaintiff again appealed.

Defendants filed a motion to affirm. They argue that this appeal is insubstantial and that because this court dismissed the first appeal for lack of jurisdiction, this case should have ended when this court filed its order and judgment. In his response to the motion to affirm, plaintiff argues the Rule 58 separate document requirement is a mechanical, nondiscretionary procedure.

Rule 58, in pertinent part, provides that "[s]ubject to the provisions of Rule 54(b) . . . [e]very judgment shall be set forth on a separate document." *See* United States v. Evans, 365 F.2d 95, 97-98 (10th Cir. 1966). As discussed in the first order and judgment, Rule 54(b) provides that in cases involving multiple claims or parties, a district court may direct the entry of a final judgment as to fewer than all of the claims "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

We believe that the district court correctly followed these rules. When the district court entered its August 29, 1984, order granting summary judgment and dismissing the action as to both defendants, it disposed of fewer than all of the parties' claims and failed to adjudicate the rights and liabilities of all the parties. The counterclaim was still pending. Furthermore, the district court did not expressly direct entry of judgment or make an express determination that there was no just reason for delay. United States v. Evans, 365 F.2d at 98. Consequently, the August 29, 1984, order could not have been a final order from which plaintiff could appeal.

Plaintiff apparently recognized the August 29, 1984, order was not a final order, because he filed a motion for Rule 54(b) certification. In its September 27, 1984, order, finding no just reason for delay and granting Rule 54(b) certification, the district court stated the August 29, 1984, order was a final judgment pursuant to Rule 54(b). This order met the Rule 58 separate document requirement and established with certainty on September 27, 1984, that a final judgment had been entered. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386, *reh'g denied*, 436 U.S. 915

(1978); *United States v. Indrelunas,* 411 U.S. 216, 222 (1973); *United States v. Kansas City,* 761 F.2d 605, 606 (10th Cir. 1985); *United States v. Clearfield State Bank,* 497 F.2d 356, 358 (10th Cir. 1974). As we stated in our previous order and judgment, the district court's Rule 54(b) certification necessitated that a second, valid notice of appeal be filed within thirty days after September 27, 1984. *See* 10th Cir. R. 17(b).

Defendant's motion to affirm the judgment of the United States District Court for the District of Wyoming is GRANTED, and the judgment is AFFIRMED.

The mandate shall issue forthwith.

/s/ Howard K. Phillips, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NO. C84-0191-B1

CLIVE DILLON,

Plaintiff,

vs.

RAYMOND LUTTERMAN, in his official capacity and as an individual, and the CITY OF POWELL, a municipal corporation,

Defendant.

ORDER DENYING MOTION FOR ORDER DIRECTING ENTRY OF SUMMARY JUDGMENT

(Filed August 5, 1985)

Plaintiff has moved the Court for an "Order directing that Summary Judgment, granted on August 29, 1984 be set forth on a separate document pursuant to Rule 58 F.R.C.P." The plaintiff urges that because the August 29, 1984 order contains a discussion of the facts and legal issues of this case, it is not a final judgment. That order states "It is Ordered that . . . this case is hereby dismissed as to both defendants, with prejudice." Thereafter on September 27, 1984 this Court entered its Order stating that "the Order on Motions for Summary Judgment entered herein on August 29, 1984 is a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure." Under Rule 54(b) a "judgment" is "the pronouncement of that decision and the act that gives it legal effect." § 2651, Wright & Miller, Federal Practice & Pro-

cedure. "While an opinion may embody a final decision, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." *U.S. v. F. & M. Schaefer Brewing Co.* (1958), 78 S.Ct. 674, 356 U.S. 227. In this case the order of August 29, 1984, by dismissal with prejudice, is surely a final decision, for from that time on, the case was finally disposed of, as the order of September 27, 1984 makes clear. The purpose of Rule 58, requiring an unequivocal act as a final judgment, was surely accomplished by either the order of dismissal or the order that said it was a "Final Judgement." Therefore, it is

ORDERED that plaintiff's motion be denied.

Dated this 5th day of August, 1985.

/s/ Clarence Brimmer
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-2309

(D.C. No. C84-0191-B)
(D. Wyo.)

CLIVE DILLON,

Plaintiff-Appellant,

v.

RAYMOND LUTTERMAN, in his official capacity and as an individual and CITY OF POWELL, a municipal corporation,

Defendants-Appellees.

ORDER AND JUDGMENT

(Filed June 12, 1985)

Before Honorable James K. Logan and Honorable John P. Moore, Circuit Judges, and Honorable Bobby R. Baldock, District Judge.*

*The Honorable Bobby R. Baldock, United States District Judge for the District of New Mexico, sitting by designation.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This is an appeal from an order of the United States District Court for the District of Wyoming granting defendants' motion for summary judgment.

Plaintiff commenced this 42 U.S.C. § 1983 action, seeking money damages against Lutterman, the General Com-

missioner for the City of Powell, and City of Powell. Plaintiff alleged defendants violated his First Amendment right to freedom of speech and his Fourteenth Amendment right to due process when he was discharged from his position as head of the municipal public electrical department.

Defendant City of Powell filed a counterclaim against plaintiff for the value of electrical power improperly taken by plaintiff. Defendants filed a motion for summary judgment. On August 29, 1984, the district court entered an order granting summary judgment on plaintiff's claims as to both defendants. City of Powell's counterclaim was the only issue left undecided. Plaintiff filed a notice of appeal on September 18, 1984. On September 27, 1984, plaintiff filed a motion seeking a determination that the summary judgment was a final order pursuant to Fed. R. Civ.P. 54(b). The same day the district court entered an order granting the motion and stating there was no just reason for delay. On September 28, 1984, City of Powell filed a motion to dismiss its counterclaim without prejudice. The district court granted the motion the same day.

On appeal, plaintiff contends (1) the voluntary dismissal of defendants' counterclaim cured any defect in the premature notice of appeal since there were no pending claims to be determined by the district court; (2) a reasonable construction of the Federal Rules of Appellate Procedure should operate to allow consideration of this matter on its merits; (3) oral argument should be allowed since this matter involves an important issue as to appellate procedure, which may foreclose plaintiff's right to be heard on the merits; (4) the order upon motion for summary judgment may be construed as being in violation of

Fed. R. Civ. P. 58; and (5) this court should review this matter on its merits.

Fed. R. Civ. P. 54(b) provides that in cases involving multiple claims or parties, a district court may direct the entry of a final judgment as to fewer than all of the claims "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Without such a determination and direction, a decision without adjudication of all the claims does not terminate the action.

Rule 54(b) requires an express determination and direction for entry of a judgment adjudicating fewer than all of the claims of the parties. Lamp v. Andrus, 657 F. 2d 1167, 1169 (10th Cir. 1981). When such an express determination and direction is not made, the order is not final or immediately appealable. A.O. Smith Corp. v. Sims Consolidated, Ltd., 647 F.2d 118, 119-20 (10th Cir. 1981). A Rule 54(b) certification obtained from the district court after a notice of appeal has been filed does not cure the defective notice of appeal. *Id.* at 120-21; McKinney v. Gannett Co., Inc., 694 F.2d 1240, 1247 (10th Cir. 1982). The certification merges with the order to become a final judgment, appealable only upon timely filing of a new notice of appeal within thirty days of certification. *A.O. Smith Corp.*, 647 F.2d at 120-21. Because jurisdiction is determined as of the date the notice of appeal is filed, all appellate jurisdictional prerequisites must be satisfied as of that date. *Lamp*, 657 F.2d at 1169. Compliance with filing requirements is mandatory and jurisdictional. Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978).

Plaintiff's notice of appeal was premature because it was filed before the Rule 54(b) certification. The district court's subsequent certification that the order granting summary judgment was a final order necessitated that a second, valid notice of appeal be filed within thirty days. The even later voluntary dismissal of the counterclaim did not cure the premature notice of appeal.

Because plaintiff's notice of appeal was premature, this court does not have jurisdiction to consider this appeal. Consequently, plaintiff's other arguments need not be addressed. *See* 10th Cir. R. 17(b).

This appeal is *DISMISSED* for lack of jurisdiction.

The mandate shall issue forthwith.

/s/ Howard K. Phillips, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C84-0191B

CLIVE DILLON,

Plaintiff,

vs.

RAYMOND LUTTERMAN, in his official capacity and as an individual and the CITY OF POWELL, a municipal corporation,

Defendants.

ORDER DETERMINING THAT ORDER GRANTING SUMMARY JUDGMENT IS FINAL JUDGMENT

(Filed September 27, 1984)

THE ABOVE ENTITLED MATTER, having come before the Court upon the Motion of plaintiff for a determination that the Order entered herein on August 29, 1984, is a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Court being advised in the premises,

IT IS ORDERED, that there was and is no just reason for delay herein and the Order on Motions for Summary Judgment entered herein on August 29, 1984, is a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

DATED this 27 day of September, 1984.

/s/ Clarence A. Brimmer
Federal District Judge

Supreme Court, U.S.
FILED
MAY 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1548 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CLIVE DILLON,

Petitioner,

v.

RAYMOND LUTTERMAN, in his official capacity and as an individual and the CITY OF POWELL, a municipal corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

BRUCE W. SATTLER
A. BRUCE JONES
(Counsel of Record)
Holland & Hart
2900 Anaconda Tower
555 Seventeenth Street
Denver, Colorado 80202
(303) 295-8000
Attorneys for Respondents

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT HAD SATISFIED THE SEPARATE DOCUMENT REQUIREMENT OF FED. R.CIV.P. 58.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Summary of Argument	1
Argument	2
I. Petitioner Fails to Present an Issue Worthy of This Court's Review Pursuant to a Writ of Certiorari	2
II. The Tenth Circuit's Rule 58 Decision Presents a Narrow, Isolated Issue and Does Not Warrant Review	2
III. Petitioner's Effort to Secure Review of the Tenth Circuit's Decision Regarding His Premature Notice of Appeal is Untimely	4
IV. If Properly Before This Court, the Question of the Timeliness of Petitioner's First Appeal Does Not Warrant Review	4
Conclusion	6

TABLE OF AUTHORITIES

CASES:	PAGE
A.O. Smith Corp. v. *Sims Consolidated, Ltd.*, 647 F.2d. 118 (10th Cir. 1981)	5
Burlington Northern R.R. v. *Clay*, No. 84-1162, *cert. denied*, 53 U.S.L.W. 3634 (U.S. March 4, 1985)	5
Diamond v. *McKenzie*, 770 F.2d 225 (D.C.Cir. 1985)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1548

CLIVE DILLON,

Petitioner,

v.

RAYMOND LUTTERMAN, in his official capacity and as an individual and the CITY OF POWELL, a municipal corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

SUMMARY OF ARGUMENT

Petitioner fails to raise an issue worthy of this Court's review. The Tenth Circuit properly construed Rule 58. Moreover, the decision is on a narrow, isolated issue, which is unlikely to recur in a manner such that this Court's guidance is necessary.

Petitioner's Rule 54 argument is not properly before the Court. Additionally, the Tenth Circuit's decision in this regard is akin to an internal operating procedure, and does not warrant review.

ARGUMENT

I. PETITIONER FAILS TO PRESENT AN ISSUE WORTHY OF THIS COURT'S REVIEW PURSUANT TO A WRIT OF CERTIORARI.

Petitioner Clive Dillon ("petitioner" or "plaintiff") attempts to present two questions for consideration by this Court on a writ of certiorari. First, he claims that in its order of January 30, 1986, the Tenth Circuit "has so far departed from the accepted and usual course of judicial proceedings so as to make the mechanically applied 'separate document' rule (Rule 58 Fed.R.Civ.P.) a nullity." Petition at 5. Second, plaintiff attempts to challenge the Tenth Circuit's decision of June 12, 1985, dismissing his first appeal because of the premature filing of the notice of appeal. Neither of these issues warrants review by this Court. Additionally, plaintiff is untimely in his attempt to gain review of the ruling regarding the premature notice of appeal.

II. THE TENTH CIRCUIT'S RULE 58 DECISION PRESENTS A NARROW, ISOLATED ISSUE, WHICH IS UNLIKELY TO RECUR AND DOES NOT WARRANT REVIEW.

The Tenth Circuit's decision of January 30, 1986 (hereafter referred to as the "Rule 58 decision") does not present an issue worthy of this Court's attention. Contrary to plaintiff's assertion, the Rule 58 decision is not a departure from the accepted and usual course of judicial proceedings. The decision was based upon a straightforward application of Rule 58 to the particular facts of this case. The issue was such that the Tenth Circuit did not require oral argument, nor was the decision published. The court was confronted with the simple question of whether the district court, under the particular circumstances of this case, had complied with the requirements of Rule 58.

A review of the order of the district court dated September 27, 1984, which is attached to the petition as Appendix D, reveals clear compliance with Rule 58. The district court had entered summary judgment on behalf of defendants on August 29, 1984. Because of the pendency of defendants' counterclaim, this summary judgment order was not immediately appealable. Therefore, plaintiff sought a Rule 54(b) determination. On a separate document, Judge Brimmer stated that his previous summary judgment decision was a final judgment. This order clearly satisfied the requirements of Rule 58. That rule, by its own terms, is subject to the provisions of Rule 54(b). In the context of this case, the separate document requirement was satisfied. More importantly, the purpose behind Rule 58 — clear indication of a final, appealable judgment — was met. *See generally Diamond* v. *McKenzie,* 770 F.2d 225, 231-35 (D.C. Cir. 1985) (Robinson, C.J., concurring) (discussing history of Rule 58 and satisfaction of separate document requirement).

The Tenth Circuit's proper analysis of this isolated procedural issue is not one this Court should review. A ruling of this type is unlikely to recur, nor have significant precedential impact. The only reason Rule 58 became an issue in this case was because of plaintiff's premature notice of appeal and failure to file a timely notice following the September 27 order. Only when it became apparent that his first appeal might be dismissed did plaintiff question whether Rule 58 had been complied with by the district court. This sui generis situation is not one to which this Court should devote its time and energy.

III. PETITIONER IS UNTIMELY IN HIS EFFORTS TO SECURE REVIEW OF THE TENTH CIRCUIT'S JUNE 12, 1985, DECISION REGARDING HIS PREMATURE NOTICE OF APPEAL.

In his statement of jurisdiction, plaintiff states that he is seeking review of the Tenth Circuit's Order and Judgment entered on January 30, 1986. This is the only judgment from which plaintiff filed a timely petition. The order of January 30 dealt solely with the question of Rule 58. Yet, plaintiff has inserted into his petition the question determined in the Tenth Circuit's decision of June 12, 1985, regarding Rule 54(b). The time for seeking a writ of certiorari from that judgment expired long before the filing of the present petition. Instead of asking this Court to review the June order, plaintiff went back to the district court and sought a Rule 58 order. The Tenth Circuit's affirmance of the district court's denial of that motion is the only matter timely brought before this Court.

IV. IF PROPERLY BEFORE THIS COURT, THE QUESTION OF THE TIMELINESS OF PETITIONER'S FIRST APPEAL DOES NOT WARRANT REVIEW.

After the entry of summary judgment for defendants, plaintiff filed his initial notice of appeal. Afterwards, he sought and received a determination from the district court that the summary judgment decision was an appealable order pursuant to Rule 54(b). The Tenth Circuit dismissed plaintiff's first appeal because he had filed his notice before securing a Rule 54(b) determination.

When an appeal is filed prematurely because of failure to comply with Rule 54(b), a court of appeals has a number of options. First, it can dismiss the appeal and require that

the notice be filed in the proper sequence following the Rule 54(b) order. Second, it can hold the appeal on its docket until such time as any defect is cured by an appropriate order from the district court. Third, it can remand the case for entry of an appropriate order by the district court, after which the case will be returned to the court of appeals. None of these options conflicts with Rule 54(b) or Fed.R.App.P. 4(a)(2). The latter rule deals with a notice of appeal filed after the announcement of a judgment, but before its entry. To benefit from Rule 4(a)(2) here, plaintiff would need to have filed his notice after the Rule 54(b) determination, but before entry of same on the court's docket. Instead, plaintiff filed his notice of appeal before even requesting a Rule 54(b) order.

The Tenth Circuit has chosen the first option discussed above. This choice is clear from precedents of the Tenth Circuit. *See, e.g., A.O. Smith Corp.* v. *Sims Consolidated, Ltd.*, 647 F.2d. 118 (10th Cir. 1981). The fact that other circuits have chosen different options does not warrant a grant of certiorari. In fact, this Court has denied certiorari recently in a case challenging an identical application of Rule 54(b) by the Tenth Circuit. *See Burlington Northern R.R.* v. *Clay*, No. 84-1162, *cert. denied*, 53 U.S.L.W. 3634 (U.S. March 4, 1985). The Tenth Circuit's position is, in effect, little different than an internal operating procedure. This is not the type of question that warrants resolution by the Supreme Court. Therefore, despite the conflict between the circuits, the Court should deny the petition for writ.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

BRUCE W. SATTLER
A. BRUCE JONES
(Counsel of Record)
Holland & Hart
2900 Anaconda Tower
555 Seventeenth Street
Denver, Colorado 80202
(303) 295-8000
Attorneys for Respondents

Date: April 30, 1986.